

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

VADIM BARCA)	
Claimant)	
V.)	
)	Docket No. 1,065,925
JCP LOGISTICS, INC.)	
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE CO.)	
OF PITTSBURG, PA)	
Insurance Carrier)	

ORDER

Claimant requested review of the October 24, 2014, Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on February 17, 2015.

APPEARANCES

Zachary A. Kolich, of Shawnee Mission, Kansas, appeared for the claimant. Daniel J. Lobdell, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ denied claimant's claim for compensation, finding claimant failed to prove it was more probably true than not that claimant sustained personal injury arising out of and in the course of his employment. The ALJ also denied claimant's request for future medical benefits and found respondent and its carrier should be reimbursed for any benefits previously paid.

Claimant appeals arguing the Award should be reversed and an Award entered for a 12 percent permanent partial disability to the body as whole, an average of the opinions of Dr. Zimmerman and Dr. Pratt, and for future medical treatment.

Respondent argues the Award should be affirmed. In the event the Board reverses the Award, respondent contends it should adopt Dr. Hall's opinion and find claimant has no permanent impairment to his bilateral upper extremities and is not entitled to future medical benefits.

Issues on appeal:

1. Did claimant prove that he sustained personal injury as defined in the Workers Compensation Act?
2. Did claimant meet with personal injury by repetitive trauma?
3. Did claimant's alleged personal injury by repetitive trauma arise out of and in the course of his employment with respondent?
4. What is the nature and extent of claimant's permanent disability, if any?
5. What if any compensation is due claimant?
6. Is claimant entitled to future medical benefits?
7. Are the statutory provisions of K.S.A. 44-510h, K.S.A. 44-510k and K.S.A. 44-525, constitutional?¹

FINDINGS OF FACT

Claimant worked for respondent in the logistics center as a temporary employee from July 2008 to September 2008 and from April 2009 to October 20, 2009. On October 21, 2009, claimant became a full-time employee. His job as a detail checker involved lifting boxes from pallets on a conveyor, cutting the boxes open, taking garments out, hanging them on a line, taking garments out of plastic wrapping and scanning each garment with a handheld scanner gun. The job also involved some keyboard entry. Claimant also used a price tag gun to attach new tags and used both hands to attach shoplifting ink tags on garments. Claimant indicated his job is hand and arm intensive and repetitive.

¹ Claimant acknowledges the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. This issue is preserved for further review and determination should the case go to the Court of Appeals.

Claimant began to notice symptoms on or about May 17, 2013. The symptoms started on his right side down his arm and into his hand and fingers and then went into his right shoulder, across the neck and back and down into the left side. Claimant testified the repetitive motion started giving him pain. He denied any of his activities outside his work require repetitious movements. He also denied any activities at home or away from work caused the injury.

Claimant testified that when he noticed his symptoms on May 17, they were isolated to his right hand. Claimant was off work May 18 and 19, and during those days his pain began to spread from his right arm, across his shoulders to his left arm. Claimant indicated he didn't do anything but some shopping in those two days and did nothing he felt would cause his symptoms to spread.

Claimant reported his problems to his supervisor, David, on May 24, 2013. Claimant was sent to see Vincent DiGiovanni, a fitness specialist in the plant medical department. Mr. DiGiovanni is not a doctor. On May 28, 2013, Mr. DiGiovanni gave claimant restrictions until he was able to see Dr. Kloiber, the plant physician. Dr. Kloiber examined claimant on June 3, 2013. He agreed with the restrictions from Mr. DiGiovanni. The history provided to Dr. Kloiber indicated pain developing in the right hand on May 17, 2013, with no specific incident. The pain then spread up the right arm, over to the left arm and down to the left hand over the course of the next few days.

Claimant filed a workers compensation claim and was notified by letter dated June 3, 2013, that his claim for workers compensation benefits was denied. Once his claim was denied, claimant sought treatment with his primary care physician, Susan Fajardo, M.D. Claimant also met with orthopedic surgeon Edward Prostic, M.D., at the request of his attorney. Dr. Prostic recommended carpal tunnel surgery, but claimant declined. Claimant continued to work full-time during his treatment.

Claimant testified the amount of money he makes an hour is determined by his productivity and, should he not meet his goal, his rate of pay would be reduced based on his productivity level. Claimant testified this process is stressful because he wants to earn all that he can. Since claimant returned to work he has reduced his productivity level and his wages have been reduced due to his upper extremity symptoms and problems with his arms.

Claimant testified his filing a workers compensation claim had nothing to do with him being disciplined for his failure to meet production quotas a week and half prior to the start of symptoms. Claimant testified he didn't agree with his reprimand and felt he wasn't getting fair treatment from his supervisor. Claimant spoke with HR about his supervisor on May 16 to try and resolve the issues with his supervisor. The next day he started having symptoms during his shift, which ran from 3:06 p.m. to 11:36 p.m.

Claimant confirmed that at his August 14, 2013, deposition, he agreed his injury and pain were part physical and part psychological, indicating he was upset about the violation under which he was written up and about the movements of his hands. More recently, claimant alleged there is no psychological component to his injury.

Claimant met with board certified orthopaedic surgeon, Michael M. Hall, M.D., on August 15, 2013, for evaluation of his bilateral upper extremities. The history provided to Dr. Hall indicated claimant visited HR at respondent's facility on May 16, to express his concern over the production violation writeup. Then, on May 17, while at home, claimant started having pain in his right hand which radiated to the dorsum of the forearm through the elbow, to the right shoulder, across the neck to the left shoulder through his left elbow to his hand. This "occurred without an accident."²

Claimant complained of pain in his hands, arms, shoulders, wrists and elbows. He indicated the pain had been present for three months. He described the pain as dull, sharp and tingling with numbness and burning. This pain occurred at rest, with activity and at night. Claimant also reported headaches and dizziness. Dr. Hall noted claimant complained his pain radiated from his neck down through the shoulders, elbows and wrists. Claimant reported the pain was better at rest and worse with activity or elevation.

Claimant rated his pain at a moderate intensity, 4/7 on a scale of 0-10. Claimant reported he was not worried about his neck, shoulder or elbow. He was more concerned about the nondescript pain in his left forearm, more so than the right. Specifically, claimant pointed to his entire forearm and then, when asked to point with one finger, he pointed towards the dorsum of the wrist from the elbow down into the fingers. Claimant was concerned about numbness in the entire hand. Claimant denied any neck issues. The doctor acknowledged claimant might have had mild right shoulder discomfort.

Claimant displayed a full range of motion in his neck with a negative Spurling. Bilateral shoulder motions were full with negative impingement signs, but he had pain over the right trapezius. Claimant's elbow displayed full range of motion with a negative compression test and no tenderness. He had no pain with resisted flexion and extension of the wrist. He had questionable tenderness along the mobile wad, left more than right; tenderness along the left middle, index and thumb A-1 pulleys in decreasing intensity and mild discomfort over the right thumb A1 pulley. He had a negative Phalen's and Tinel's test bilaterally.

Dr. Hall opined claimant had possible pain, likely overuse and recommended an EMG and requested claimant have physical therapy. He didn't know if there was much he could do to help claimant because he found little on the exam. Dr. Hall noted claimant was upset about being written up and that psychological distress influenced the exam. Dr. Hall

² Hall Depo., Ex. 2 at 22 (Dr. Hall's August 15, 2013, report).

wrote claimant was afraid he had permanent damage that would affect his ability to work. Dr. Hall didn't feel claimant was in need of surgery, but the job he was doing may cause overuse discomfort. He did not believe claimant's problems were related to his work. Dr. Hall offered to send claimant for an EMG and physical therapy even though he didn't feel it would benefit claimant. In his August 15, 2013, report Dr. Hall stated:

He wanted therapy and I told him I do not know what I am going to be writing a script for. Overuse? They cannot really treat that, but if that makes everybody happier, I will sent him to therapy for a few weeks. He thinks that will increase the blood flow?

. . . I offered him injection. He declined. That is a bad sign. If his pains are bad enough to go this far, the offer of treatment should be accepted. I doubt I'll offer again.³

Dr. Hall disagreed that claimant had carpal tunnel syndrome. He found no such condition. Claimant remained on full duty. In a letter dated September 12, 2013, Dr. Hall clarified his diagnosis as overuse syndrome, he recommended the three weeks of physical therapy and recommended an EMG to make sure he was not missing anything.

On September 24, 2013, claimant returned to Dr. Hall with no change in his condition. He had discomfort along the A1 pulleys of both hands. His EMG was negative. Claimant was sent for three weeks of physical therapy. If physical therapy did not help, an FCE would be obtained and permanent restrictions assigned, if necessary.

On November 11, 2013, claimant met with the physical therapist for re-evaluation of his shoulders. Claimant's pain was a 3 out of 10, with intense pain in the wrists. His exercises were helping with his pain, but he continued to have increased pain and difficulty with repetitive activities at work. His pain was minimal with activities of daily living. Claimant was on modified work duty at this time.

Dr. Hall last saw claimant on November 19, 2013, at which time claimant had no complaints and had lowered his job requirements. His pain level was a 3 out of 10. Dr. Hall found claimant to be at maximum medical improvement and released him to full duty with no restrictions. He testified claimant is not in need of additional treatment. On February 3, 2014, using the 4th Edition of the *AMA Guides*, Dr. Hall rated claimant at 0 percent impairment to the upper extremities.

At his attorney's request, claimant met with board certified independent medical examiner Daniel Zimmerman, M.D., for an examination, on December 27, 2013. His chief complaint was pain and discomfort affecting the right and left upper extremities. Dr. Zimmerman noted when claimant's symptoms first started he had numbness affecting the

³ *Id.*, Ex. 2 at 24.

second through fifth digits and pain that impacted his ability to sleep at night. Claimant also occasionally woke up with numbness and tingling affecting the digits of one or the other upper extremity, particularly if he rolled over onto that side at night. Dr. Zimmerman wrote claimant developed right and left upper extremity symptoms suggestive of entrapment neuropathies affecting the median nerves while carrying out repetitive work duties with respondent. Claimant reported he was not taking any medications for his symptoms.

Upon examination, Dr. Zimmerman found claimant's symptoms were less severe since his treatment. He found symptoms suggestive of right and left carpal tunnel syndrome. The strength in the right and left upper extremities was good. There was no thenar, hypothenar or interosseous muscle atrophy on the right and left sides. The nerve conduction and EMG studies performed on claimant's left upper extremity were read as normal. Dr. Zimmerman focused on the wrists and forearms, not finding anything in the elbows that warranted a detailed examination. Tinel's test bilaterally caused a pins and needles sensation affecting the thenar eminence in both upper extremities. The Phalen's test caused pain in the upper arm musculature bilaterally, but caused no pain or discomfort in the hands, wrists or digits.

Dr. Zimmerman opined claimant's condition was stable and he did not believe further diagnostic or therapeutic intervention was warranted. Claimant was found to be at maximum medical improvement, but the doctor found it more probably true than not that additional medical treatment would be necessary in the future. Dr. Zimmerman told claimant he could use aspirin, Tylenol or an over-the-counter nonsteroidal anti-inflammatory medication should he choose to use medication. Claimant was also told he could do hot soaks or use a heating pad.

Dr. Zimmerman opined the prevailing factor for claimant's overuse syndrome, consistent with right and left carpal tunnel syndrome, was the repetitive work duties performed in claimant's employment with respondent through May 24, 2013. Dr. Zimmerman's proof that claimant's symptoms interfered with his activity were a positive Tinel's test, pain with firm palpation over the carpal canals, and pain in the upper arms during the Phalen's test, which is consistent with bilateral upper extremity repetitious trauma induced disorders.

On January 17, 2014, Dr. Zimmerman found claimant to have a 15 percent permanent partial impairment to each upper extremity, which converts to a 9 percent whole body impairment, and combining for a 17 percent permanent partial impairment to the body as a whole. The ratings were derived using the 4th Edition of the *AMA Guides*.

Dr. Zimmerman testified his rating was based solely on pain, sensory deficit, and discomfort. He didn't feel any of the rating was attributable to weakness in the upper extremities as a consequence of overuse syndrome or carpal tunnel syndrome. He noted claimant had no range of motion limitations.

Dr. Zimmerman was not asked to provide restrictions at the time of the initial visit, and chose not to provide restrictions at the time of his deposition, given the length of time it had been since he last met with claimant.

Claimant met with board certified physical medicine and rehabilitation specialist, Terrence Pratt, M.D., on April 24, 2014, for a court-ordered independent medical examination (IME). Claimant complained of bilateral upper extremity symptoms. Specifically, the dorsal and palmar aspects of the left hand were as if he had a fracture of the forearm and distal arm. He reported sticking, pinching, and pins and needles of the index through little fingers and less for the thumb. Claimant also had a knife cutting sensation versus stinging. On the right, he had numbness of the index through ring fingers, but only slightly for the thumb. He had no significant forearm or wrist symptoms on the right, but had symptoms in the area on the pain diagram. Claimant reported shoulder to limiting arm sticking, pinching or knife cutting sensations. For both upper extremities, he reported pain as opposed to weakness. He reported his symptoms are potentially exacerbated with movements.

Dr. Pratt noted claimant is functionally performing his job tasks and is independent in activities of daily living and is able to drive. On the pain diagram, claimant reported his pain to be a 3 out of 10 on the right and 4 out of 10 on the left.

Upon examination, Dr. Pratt opined claimant had bilateral upper extremity discomfort with an apparent history of overuse syndrome. There were no significant findings noted on two-point discrimination for sensory assessment. Claimant had good motor abilities and good active movements of all other major joints. There was no palpable tenderness in the upper extremities and no significant objective findings to result in a specific diagnosis. Only claimant's subjective symptoms were suggestive of overuse syndrome. Claimant's prior EMG did not assess for the ulnar nerve across the elbow level. Dr. Pratt had no treatment recommendations for claimant's elbow symptoms, but he did agree that claimant needed stress management.

In relation to the overuse syndrome diagnosis, Dr. Pratt opined it was difficult to state a specific diagnosis as claimant has subjective⁴ symptoms suggesting an overuse syndrome with limited objective findings on examination. There was no significant evidence of carpal tunnel syndrome on the prior EMG. There were no external or visible signs of a new lesion or change in physical structure of claimant's body. Dr. Pratt opined the combination of work tasks, and work violation resulted in the onset of claimant's symptoms. He found no support for a diagnosis of carpal tunnel syndrome.

Dr. Pratt testified that some objective findings of overuse syndrome would be edema, loss of range of motion, loss of motor function, loss of sensory functions and

⁴ Subjective, meaning claimant telling him he was experiencing pain.

specific pattern of palpable tenderness. Claimant did not have or fit into the requirements in these areas.⁵

Using the 4th Edition of the *AMA Guides*, Dr. Pratt assigned a 5 percent impairment to the right upper extremity and a 6 percent to the left upper extremity. These convert to a 3 percent and 4 percent permanent partial impairment whole person and combine for a 7 percent permanent partial impairment to the whole person on a functional basis in relationship to claimant's discomfort.

On April 28, 2014, Dr. Pratt provided an addendum to his report indicating claimant provided a letter dated April 25, 2014, stating he also had headaches in association with his upper extremity involvement and asked if Dr. Pratt would consider them as relevant to the upper extremity involvement. Dr. Pratt responded stating the headaches were relevant to claimant's presentation, but he could not relate them directly to the upper extremity involvement in relationship to claimant's reported vocationally related activities. Also, at the time of the initial assessment, claimant denied cervical symptoms.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the

⁵ Pratt Depo. at 15-17.

injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f)(1) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

Claimant argues all three medical providers who examined claimant diagnosed overuse syndrome. This is factually correct. However, the various examining and treating physicians were inconsistent in their evaluation of claimant. Dr. Zimmerman diagnosed carpal tunnel syndrome. Neither Dr. Hall nor Dr. Pratt diagnosed this condition. Dr. Zimmerman found nothing in the elbows to justify an examination. However, claimant complained of elbow pain to other health care providers. To identify overuse syndrome, Dr. Pratt anticipated finding edema, loss of range of motion, loss of motor function, loss of sensory functions or a specific pattern of palpable tenderness. None of these were present during his examination of claimant.

K.S.A. 2013 Supp. 44-508(f)(1) defines "personal injury" and "injury" as "any lesion or change in the physical structure of the body, causing damage or harm thereto." No expert in this matter identified any lesion or change in claimant's physical structure. The diagnosis of overuse syndrome was made based on subjective complaints from claimant.

Based upon this record, the Board finds claimant has failed to prove personal injury or injury arising out of or in the course of his employment with respondent. The denial of benefits by the ALJ is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove he suffered personal injury or injury arising out of or in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated October 24, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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